



August 21, 2013

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB
Docket No. 12-108; Written *Ex Parte* Presentation

Dear Ms. Dortch:

DISH Network L.L.C. (“DISH”) and EchoStar Technologies L.L.C. (“EchoStar”) hereby supplement their July 31, 2013 *ex parte* notice filed in the above-captioned proceeding.

Functions That Must Be Made Accessible

As DISH and EchoStar stated in joint comments in this proceeding and in their July 29, 2013, meeting with Media Bureau staff, the VPAAC’s list of 11 functions should at most serve as a tool to guide covered entities’ implementation of the accessibility requirements for user interfaces, guides, and menus.¹ It is not necessary for the Commission to mandate any particular functions in order to ensure baseline accessibility.

If the Commission nevertheless decides to adopt a list of functions that must be accessible, it should:

- Clarify that the list does not establish a set of functions that must be present in every device but instead applies to a particular device only to the extent that a particular listed function is native to such device and can be used or activated by consumers directly.²

¹ See DISH and EchoStar Comments, MB Docket No. 12-108, at 5-6 (filed July 15, 2013) (“DISH and EchoStar Comments”).

² For example, if the Commission were to include “Display Channel / Program Information” on the list of functions subject to Section 205’s audible output requirement, the presence of that function on the list should not require covered entities to include in their on-screen guides any additional information beyond that which is already present in the guide. Instead, an entity would satisfy its obligation with respect to Display Channel / Program Information by ensuring that the text in the guide could be read aloud to the user (e.g., using a text-to-speech solution) when audible output is enabled.

- Adopt the proposal in the *Notice* that the list of functions required to be accessible specifically exclude debugging and diagnostic functions.³
- For navigation devices covered by Section 205, exclude items 5 and 9 on the VPAAC's list of 11 functions — “Configuration – Setup” and “Display Configuration Info” — which represent broad, umbrella categories of functions that reach beyond the narrow, more easily identifiable types of device functions targeted by Section 205.⁴
- For navigation devices covered by Section 205, also exclude items 1 and 2 on the VPAAC's list of 11 functions — “Power On/Off” and “Volume Adjust/Mute.”⁵

Optional and Third-Party Applications

The Commission should not apply the Section 205 rules to standalone software and applications offered by MVPDs.⁶ First, Section 205 explicitly applies only to “navigation devices,” as defined in Section 76.1200 of the Commission's rules, which refers only to *equipment* used to access MVPD services and not to standalone software.⁷ Second, expanding Section 205 to reach MVPD standalone applications would be inconsistent with the

³ See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, 28 FCC Rcd 8506, 8517-18, ¶ 30, 8250, n.92 (2013) (“*Notice*”).

⁴ Because some on-screen menus for Configuration – Setup or Display Configuration Info may not relate to the display or selection of multichannel video programming, it would be inappropriate for the Commission to require covered entities to make all such menus audibly accessible. *Compare Notice*, 28 FCC Rcd at 8520, ¶ 36 (tentatively concluding that the 11 essential functions are representative of the categories of functions that a navigation device must make accessible), with 47 U.S.C. § 303(bb)(1) (requiring on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming to be audibly accessible in real-time upon request, if achievable).

⁵ Because Power On/Off and Volume Adjust/Mute functions typically are not accessed via on-screen menus and guides, in many cases Section 205's audible output requirement would not apply to these functions. *Compare Notice*, 28 FCC Rcd at 8520, ¶ 36, with 47 U.S.C. § 303(bb)(1). Moreover, some navigation devices, such as set-top boxes, may not include built-in speakers, and consequently, providing audible output for the Power On/Off function would present challenges with respect to these devices. With regard to the Volume Adjust/Mute function, any increase or decrease in volume, or muting, should be deemed sufficient to satisfy the audible output requirement to the extent it applies.

⁶ See *Notice*, 28 FCC Rcd 8514-15, ¶ 24.

⁷ See 47 C.F.R. § 76.1200(c) (emphasis added) (defining “navigation devices” as “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems”).

Commission's approach to implementing similar CVAA-related accessibility requirements for equipment, which have been interpreted by the Commission to apply only to physical devices and integrated software.⁸ Third, applying Section 205 to optional software that consumers download by choice, such as MVPD standalone applications, also would be problematic from a technical perspective and may deter MVPDs from offering such applications. MVPD standalone applications rely on the capabilities of third-party devices to deliver navigation device features, and due to the wide range of devices available in the market, attempting to ensure that the accessibility features of a particular application work on all devices would present technical and economic challenges that may result in the decision simply to not offer such applications.

Reasonably Comparable to a Button, Key, or Icon

Adopting a mechanism "reasonably comparable to a button, key, or icon" to access closed captioning functionality does not require a dedicated button or "single step."⁹ Such a mandate would be inconsistent with the flexibility the CVAA affords covered entities with regard to the selection of the required mechanism for activating built-in closed captioning capability provided by a navigation device.¹⁰ Instead of prescribing a dedicated button or single step, the Commission should interpret "reasonably comparable" to mean the same number of steps required to access other core features of a device (e.g., for set-top boxes, the display and selection of programming). The core features and number of steps may vary among devices designed by a single manufacturer; with this approach, the Commission can ensure that individuals seeking to access captioning functionality are situated similarly to non-disabled individuals seeking to access other core functionalities, without unduly constraining manufacturers in the design of their devices.

Making Accessible Navigation Devices Available Upon Request

⁸ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 839-42, ¶¶ 93-94 (2012) (applying apparatus closed captioning requirements to physical devices and integrated software but not to third-party software that is downloaded independently by the consumer after sale); *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14588-89, ¶ 13 (2011) ("ACS Order") (interpreting accessibility requirements for equipment used for advanced communications services as covering hardware and manufacturer-provided software but not third-party software downloaded and installed by consumers independently).

⁹ See DISH and EchoStar Comments at 7-8.

¹⁰ See CVAA § 205(b)(5) (directing the Commission to permit the entity providing the navigation device maximum flexibility in the selection of the required mechanism for activating closed captioning); *id.* § 204(c) (permitting entities to comply with the accessibility requirements through "alternate means").

Section 205 does not require a covered entity to provide an accessible version of every navigation device that it offers. Instead, Section 205 requires that an MVPD provide accessible navigation devices “if achievable.”¹¹ Consistent with its interpretation of the achievability standard in other CVAA contexts, the Commission should decline to adopt the *Notice*’s proposal to require covered entities “to provide accessible versions of all the classes of devices” they make available¹² and instead clarify that covered entities are not required to “mak[e] certain that each class [of devices they offer] has at least one option that is fully accessible.”¹³ Instead, pursuant to Section 205, the Commission should afford covered entities “maximum flexibility” to determine in a commercially reasonable manner how to ensure that an appropriate selection of accessible navigation devices is available to blind and visually impaired individuals. This approach would be consistent with the Commission’s implementation of product functionality requirements in other accessibility proceedings both implementing and pre-dating enactment of the CVAA.¹⁴ If the Commission requires covered entities to provide accessible versions of all of the classes of devices they make available, and if it narrowly interprets the term “no additional cost” to preclude providers from recouping the costs of incorporating accessibility functionality in accessible devices, it should affirmatively permit providers to apply a per-user charge to all customers that will help fund the research and development necessary to fund accessible solutions.

In addition to having flexibility with regard to the selection of accessible product offerings, entities covered by Section 205 should also have the flexibility to establish company-specific processes for requesting an accessible device, which could include a phone call, email, online form, or in-person request to be made to the correct contact person, specifically stating the subscriber’s needs and providing verification that the requesting party is eligible to receive a device.¹⁵ Instead of requiring covered entities to notify consumers of the availability of accessible devices in braille or another accessible format, the Commission should engage in consumer education efforts as it has in other similar areas.¹⁶

¹¹ 47 U.S.C. § 303(bb)(1).

¹² *Notice*, 28 FCC Rcd at 8528, ¶ 53.

¹³ *See ACS Order*, 26 FCC Rcd at 14618, ¶ 145.

¹⁴ *See id.* (declining to require covered entities to include a fully accessible option in each class of devices they offer); *Amendment of the Commission’s Rules Governing Hearing Aid-Compatible Mobile Handsets et al.*, First Report and Order, 23 FCC Rcd 3406, 3426 ¶ 51 (2008) (affording covered entities flexibility to define their product levels for purposes of offering compliant handsets with differing levels of functionality).

¹⁵ *See* DISH and EchoStar Comments at 12-13.

¹⁶ *See, e.g.*, FCC, Consumer Guide for Captioning of Internet Video Programming, <http://transition.fcc.gov/cgb/consumerfacts/captionsinternet.pdf>.

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Finally where a built-in solution is available under the cost structure set forth in the statute, but a covered entity develops a separate solution that does not just “achieve the same functions” as the built-in solution but actually improves upon it (*e.g.*, by providing additional mechanisms for user input and/or feedback beyond that provided by the built-in solution), the Commission should not prohibit providers or manufacturers from imposing a reasonable charge for such a solution. Imposing such a ban would hinder innovation and delay or deter developments that could ultimately benefit blind and visually impaired individuals.

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Pursuant to section 1.206 of the Commission’s rules,¹⁷ this *ex parte* submission is being filed for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,

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¹⁷ 47 C.F. R. § 1.1206.